In the Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U. S.
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Nos. 72-792
72-802

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, et al.

Appellants,

and

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.,

Intervenors-Appellants,

vs.

DOLORES DUBLINO, et al.

Appellees.

On Appeal from the United States District Court for the Western District of New York

Brief of The State of California As Amicus Curiae on Behalf of Appellants

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INTEREST OF AMICUS CURIAE

This amicus curiae brief, which is sponsored by the Attorney General of the State of California, is submitted by the State of California on behalf of the California State Department of Human Resources Development and the California State Department of Social Welfare. The brief is submitted in support of the contention that Congress has not impliedly prohibited states from operating employment oriented programs containing work requirements for employable AFDC recipients.

California, like New York and all the other states of the Union, participates in the partially federally funded welfare program entitled Aid to Families with Dependent Children (AFDC) established by sections 401 et seq. of the Social Security Act (42 U.S.C. §§ 601 et seq.). A part of the AFDC program is the Work Incentive Program (WIN) established by sections 430 et seq. of the Social Security Act (42 U.S.C. §§ 630 et seq.). As its rationale for invalidating the New York program in this case, the District Court concluded that ". . . WIN preempts the Work Rules program."

California has a program called Community Work Experience Programs (CWEP), which is a project designed to give job training and work experience opportunities to those employable AFDC recipients for whom there is no available opening in WIN or other manpower training program.[1] There is pending in California the case of *Brian, et al. v. CWRO, et al.* (DC, CD Cal. Civil No. 72-1278-F) in which the validity of CWEP is at issue. The District Court's decision in this case has been cited by the opponents of CWEP as authority supporting their attempt to have CWEP declared invalid.

CONGRESS HAS NOT PREEMPTED THE FIELD OF EMPLOYMENT PROGRAMS

As indicated previously, the portion of the decision of the District Court in this case which is causing concern is the broad holding that Congress, by the enactment of the WIN provisions, intended to preempt employment programs containing work rules for those in the federally assisted AFDC category. That holding is erroneous.

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1. CWEP has been operating successfully in California since June of last year, pursuant to authority granted by HEW under section 1115 of the Social Security Act (42 U.S.C. § 1315).

Initially, we point out the obvious, namely, that nothing enacted by Congress in the WIN provisions themselves or in any other statute expressly prohibits states from having programs which contain work or job-search requirements. Any federal prohibition, then, must arise by implication.

Congressional prohibition by implication is not lightly assumed. Congressional intent to preempt a field of law must be clearly and unequivocally shown. *Schwartz v. Texas*, 344 U.S. 199, 202 (1952). As stated by this Court in *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933),

> "The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention so to do must definitely and clearly appear."

That general rule has direct application to the federal categorical aid programs, including the AFDC program. In *Jefferson v. Hackney*, 406 U.S. 535, 541, 545 (1972), this Court stated that state provisions dealing with AFDC programs will not be declared invalid unless they violate a specific provision of the Constitution or the Social Security Act.

There is no clear intent to preempt state work rules evidenced by Congress in the WIN provisions. The District Court's conclusion to the contrary is based on a complete failure to perceive the WIN program in the context of its operation as funded by Congress.

The WIN program is not now, nor has it ever been, a program which offered job training or public employment to *all* employable AFDC recipients. Last year, there were over 122,000 employable AFDC recipients in California. Yet there were only 18,000 WIN slots available in California. The situation was similar throughout the United States. It defies common sense to conclude that Congress, when it adopted provisions funding work and training opportunities for 18,000 employable AFDC recipients in

California, intended to impliedly prohibit California from having any employment program containing work or job search requirements for the remaining 104,000 employable AFDC recipients.

In that regard, it must be remembered that the New York program, like the California program, is not designed to place an ultimate burden on the recipient or to harass him or subject him to any penalty or sanction because he is a welfare recipient. To the contrary, the New York and California programs were developed with the hope and desire that their operation would ultimately benefit the unemployed, but employable, welfare recipient. The ultimate goal of the programs, like that of the WIN program itself, is to promote more actual employment for those recipients. Thus, in California the unemployed, but employable, AFDC parent is required to report initially to the employment service office, where his employment potential is evaluated and a job search plan developed. Thereafter, he reports to the employment office twice a month, at which time his job search efforts are evaluated. If there is an appropriate position in a WIN or other manpower training program available, he is placed in that program. As a last resort, if there is no actual employment available and there is no appropriate position in WIN or any other manpower training program available, he is requested to engage in a work experience activity for some public agency or nonprofit corporation doing work which will allow him to gain or retain work skills and maintain a history of work reliability which could be used by him to his advantage in his job search activities. Thus, there is some employment oriented activities for *all* employable recipients, not just the 10 to 20 percent thereof that can be accommodated in the WIN program. These supplemental programs cannot conflict with WIN because a recipient cannot be referred

to the supplemental program unless there is no appropriate WIN position available. It is utterly incredible to think that when Congress enacted the employment oriented WIN program and then funded it to such a limited extent that its benefits could only be offered to 10 to 20 percent of those potentially eligible, Congress intended to impliedly prohibit a state from enacting a supplemental beneficial program of its own.[2]

The District Court appears impressed by the complete and comprehensive nature of the WIN provisions. Again, the Court missed the point. Of course the WIN provisions are comprehensive. But they are only comprehensive as to those recipients for whom there are positions available in the program. The extensive WIN provisions dealing with job training, counseling and sanctions could only have application to those involved in the WIN program. It does not make sense to conclude that when Congress enacted comprehensive provisions which have a practical effect on only a small portion of the employable AFDC recipients in the state, that it intended to prohibit the state from having any employment oriented program at all which applies to the remaining employable recipients. For example, Congress might enact an extremely comprehensive and complex system for funding state programs for delivering treatment to 10 percent of the mentally retarded children in the state. Would one infer from that action that Congress impliedly prohibited the states from providing any care to the remaining mentally retarded children? Obviously not.

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2. It is probably true that the person who feels the world owes him a living and who believes that he has the right to elect to collect welfare rather than accept employment will consider the New York and California programs as a complete "burden" with no ultimate "benefit." On the other hand, to the many individuals who want to find employment and eventually break the "welfare cycle," the programs do indeed provide a real ultimate "benefit."

Moreover, the recent amendments to the WIN program made in 1971 by the "Talmadge Amendments" (PL 92-223) make clear that Congress understands that the WIN program is not all-encompassing. As amended, Section 433 of the Act (42 U.S.C. § 633) provides for priorities in the carrying out of the WIN program. Thus, in filling vacancies in the WIN program, the state is directed to give priority to unemployed fathers, volunteer mothers, other mothers, dependent children and others in that order. By recognizing the need for placement priorities for participation in the WIN program, Congress recognized that there would not be sufficient facilities in the program for all employable AFDC recipients.

In making this argument, we are not unmindful of the decision of the Fourth Circuit Court of Appeals in *Woolfolk v. Brown*, 456 F.2d 652 (4th Cir. 1972) and the fact that this Court denied the petition for certiorari therein. .... U.S. ....., The language of the Court of Appeals in *Woolfolk* does indeed appear to suport the contention that the WIN program preempts all state employment oriented programs. However, the language of the Court went far beyond that necessary to reach the desired result in that case. In that case, the localities in which the plaintiffs resided were participating in the WIN program and there were vacancies in the program. However, the plaintiffs had been determined to be "inappropriate" for referral to WIN. Nevertheless, under the Virginia Work Rule, a recipient who was not appropriate for referral to WIN was required to accept employment, if offered. It is possible to reason that Congress, in enacting the WIN provisions, established, in effect, a distinction between *employable* AFDC recipients and *unemployable* AFDC recipients. It would not be unreasonable to conclude that Congress intended to prohibit the states from applying work rules to those who are *unemployable* under the congressionally

established guidelines. Based on such a conclusion, the result in *Woolfolk* is correct. It is a mistake, however, to blindly apply the broad language of *Woolfolk* without recognizing the factual context in which the statements were made. It is one thing to hold, in a case such as *Woolfolk*, that Congress has prohibited the states from applying work requirements to *unemployable* AFDC recipients. It is an entirely different thing to hold, as did the District Court in this case, that Congress impliedly prohibited states from having an employment oriented program for *employable* AFDC recipients for whom there is no space available in WIN or other manpower training program.

CONCLUSION

The problem of getting employable welfare recipients job ready, job oriented and into actual employment is one of the major problems facing our society today. It is a problem that is being wrestled with by Congress as well as various state legislatures and welfare departments. The holding of the District Court in this case that Congress has impliedly prohibited the states from implementing programs to supplement WIN and other limited federal manpower training programs, effectively prohibits the states from trying to solve that important problem.

The decision is wrong and should be reversed.

Respectively submitted,

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